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James T. Hannon
Senior Attorney

July 12, 1999

Mr. Andrew S. Fishel
Managing Director
Federal Communications Commission
445 12th St., S.W., Room 1-C144
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Freedom of Information Act Request of MCI WorldCom Inc.,
CC Docket No. 99-117, ASD File No. 99-22
Response of U S WEST Communications, Inc.

Dear Mr. Fishel:

On June 22, 1999, MCI WorldCom Inc. ("MCI") submitted a request to you to release to the public certain materials related to the Accounting Safeguards Division ("ASD") audits of the Regional Bell Operating Companies' ("RBOC") continuing property records ("CPR") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and Section 0.461 of the Commission's Rules, 47 C.F.R. § 0.461. Specifically, MCI requests that the Commission: (1) "release to the public any materials that the RBOCs have submitted to the [ASD] to explain why hard-wired COE equipment items were not found by the auditors or to support claims that items in the audit sample should be 'rescored;'" (2) "disclose any audit workpapers generated by the ASD staff during the course of the audits that show or support the item-by-item scoring of the items in the audit sample;" and (3) "disclose the CPR detail (vintage, description, etc.) for any items scored 'partially found', 'not found,' or 'not verifiable' at any time during the audit process."¹ Commission staff have indicated that any response to MCI's FOIA request by U S WEST Communications, Inc. ("U S WEST") needs to be filed by July 12, 1999. With this response U S WEST opposes MCI's FOIA request for the public release of

¹ See MCI FOIA Request at 1-2 for further detail on the information requested by MCI.

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confidential audit materials -- both those submitted by U S WEST and internal Commission audit workpapers.

All materials submitted by U S WEST which are covered by MCI's FOIA request were submitted to the ASD pursuant to a formal audit by the Commission of U S WEST's CPRs for hard-wired central office equipment ("COE") plant. The information is highly sensitive business information which MCI could use to unfairly improve its competitive position vis-à-vis U S WEST and other competitors in this market. U S WEST routinely protects this type of information against disclosure and considers these materials to be confidential information which is protected from public disclosure under FOIA Exemption 4 and Section 220(f) of the Act. "The Commission has a longstanding policy of respecting the confidentiality of information obtained from carriers in the course of audits performed by Commission staff."² In fact, Section 220(f) specifically prohibits the release of information gathered during an audit in the absence of a Commission or Court Order.³ Release of this information would seriously undermine the Commission's future audit activities and discourage carriers from responding openly to the myriad of requests that arise in the normal course of an audit.

Previously, U S WEST voluntarily waived any rights that it had to protect the confidentiality of the ASD's December 22, 1998 Draft Audit Report and U S WEST's January 11, 1999 response to that report, under Section 220(f) of the Act or Sections 0.457 *et seq.* of the Commission's Rules.⁴ As such, U S WEST is only opposing MCI's request with respect to U S WEST's August 19, 1998 data submission addressing "not found" and "unverifiable" items in the ASD's Draft Audit Report that was released to U S WEST on July 20, 1998 (hereafter referred to as "U S WEST's data submission"). The fact that

² See In the Matter of the Bell Operating Companies, Requests for Confidential Treatment of Certain Commercial and Financial Information and Release of Summary of Audit Findings, Memorandum Opinion and Order, 10 FCC Rcd. 11541 (1995). Also see In the Matter of The GTE Telephone Operating Companies, Memorandum Opinion and Order, 9 FCC Rcd. 2588 (1994); In the Matter of BellSouth Corporation, BellSouth Telecommunications, Inc. Request for Confidential Treatment of Certain Financial Information and Release of Audit Findings, 74 Rad. Reg. 2d (P&F) 411, 412-13 ¶ 6 (1993) ("BellSouth Request").

³ See 47 U.S.C. § 220(f); also see In the Matter of J. David Stoner On Request for Inspection of Records, Memorandum Opinion and Order, FOIA Control No. 90-76, 5 FCC Rcd. 6458, 6459 ¶ 11 (1990).

⁴ See Letter from Kathleen Abernathy to Ken Moran, dated Jan. 19, 1999.

U S WEST voluntarily agreed to the public release of the ASD's Draft Audit Report and U S WEST's response in no way compromises its position that audit materials and associated data submissions must be treated as confidential information if the Commission is to expect full cooperation from carriers during the performance of Commission audits.

Contrary to the assertions of MCI, U S WEST's data submission is confidential commercial information which is protected from disclosure by FOIA exemption 4, 5 U.S.C. § 552(b)(4) and Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d). U S WEST's submission contains detailed information including pricing information on specific items used in the provision of telecommunications services, many of which are subject to significant competition.⁵ The fact that the data in question only covers a small number of items in 33 central offices in no way compromises U S WEST's claim that this data is confidential information provided during the course of an audit.

The release of U S WEST's data submission is not warranted for two reasons under existing law. First, there can be no question that U S WEST's data submission was voluntary. As such, it qualifies for confidential treatment under FOIA Exemption 4.⁶ The fact that the Commission might have successfully obtained this information through other processes absent U S WEST's cooperation is irrelevant. Even assuming arguendo that U S WEST's data submission was not voluntary, it would still qualify for confidential treatment under the two-pronged National Parks test because disclosure of the information is likely to impair the government's ability to obtain necessary information in the future.⁷

⁵ See, e.g., U S WEST's Forbearance Petitions requesting the Commission forbear from regulating U S WEST as a dominant carrier in the Phoenix, Arizona MSA and the Seattle, Washington MSA filed Aug. 24, 1998 and Dec. 30, 1998 respectively.

⁶ See Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (DC Cir. 1992), cert. denied, 113 S. Ct. 1579 (1993). "We conclude that financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Id. at 879.

⁷ National Parks and Conservation Ass'n v. Morton, 498 F. 2d 765, 770 (DC Cir. 1974).

MCI also requests that the Commission disclose audit workpapers related to item-by-item scoring in the audit sample. These audit workpapers no doubt contain much confidential information which U S WEST submitted during the course of the audit, and are accorded the same protection under Exemption 4 of the FOIA as is U S WEST's data submission referenced above. Furthermore, the ASD's audit workpapers are protected by Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5) and Section 0.457(e) of the Commission's Rules, 47 C.F.R. § 0.457(e), because they represent pre-decisional deliberations. Not only would the release of these documents discourage candid discussion within the Commission and impair the deliberative process,⁸ it would seriously undermine the efficiency and effectiveness of the audit process.⁹ In the CPR audit proceeding, the Commission has already taken the unusual step of releasing the ASD's Draft Audit Report.¹⁰ However, the Commission's release of the Draft Audit Report does not mean that the ASD's underlying audit workpapers are not protected from disclosure under the deliberative process privilege¹¹ of Exemption 5.¹²

⁸ Maricopa Audubon Society v. U.S. Forest Service, 108 F.3d 1089, 1094-95 (9th Cir. 1997), citing to Assembly of the State of Cal., 968 F.2d at 921.

⁹ BellSouth Request, 74 Rad. Reg. 2d at 412-13 ¶ 6.

¹⁰ "[T]he Commission considers the audit reports to be internal agency documents that, consistent with FOIA Exemption 5, generally should not be disclosed to the extent they present staff findings and recommendations to assist the Commission in pre-decisional deliberations." In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order, 13 FCC Rcd. 24816, 24848 ¶ 54 (1998).

¹¹ The deliberative process privilege has been held to cover "all 'recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency,' as well as documents which would 'inaccurately reflect or prematurely disclose the views of the agency.'" National Wildlife Federation v. United States Forest Service, 861 F.2d 1114, 1118-19 (9th Cir. 1988), quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (DC Cir. 1980). While U S WEST does not seek here to protect the Commission's deliberative processes, which the Commission itself is well capable of doing, U S WEST does have a serious interest in reasoned decision-making, which could be disrupted by the MCI request.

¹² In the Matter of ITT World Communications, Inc. On Request for Inspection of Records, Memorandum Opinion and Order, 86 FCC 2d 768, 774 ¶ 16 (1981).

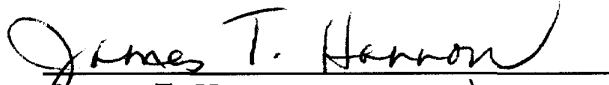
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For the forgoing reasons, the Commission should deny MCI's FOIA request. It would be particularly damaging for the Commission to grant MCI's request for access to internal memoranda subject to the deliberative process privilege -- given the fact that the Commission explicitly stated in its Notice of Inquiry on the RBOC CPR audits that "it is not passing judgment on the accuracy of the reports, their findings or conclusions."¹³

Please advise the undersigned at the earliest possible time should the Commission take any action contrary to the above-stated position of U S WEST.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.


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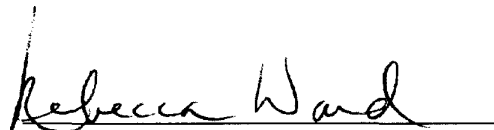
Its Attorney

cc: Ms. Mary Brown
Mr. Ken Moran
Mr. Andy Mulitz
Mr. Cliff Rand

¹³ In the Matters of Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, Bell Atlantic (North) Telephone Companies' Continuing Property Records Audit, Bell Atlantic (South) Telephone Companies' Continuing Property Records Audit, BellSouth Telecommunications' Continuing Property Records Audit, Pacific Bell and Nevada Bell Telephone Companies' Continuing Property Records Audit, Southwestern Bell Telephone Company's Continuing Property Records Audit, US West Telephone Companies' Continuing Property Records Audit, CC Docket No. 99-117, ASD File No. 99-22, Notice of Inquiry, FCC 99-69, rel. Apr. 7, 1999 ¶ 1.

CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 12th day of July, 1999, I have caused the foregoing **RESPONSE TO FREEDOM OF INFORMATION ACT REQUEST** to be 1) submitted via hand delivery to the Managing Director at the address indicated on the attached service list; and 2) served via hand delivery or first class United States Mail, postage prepaid, upon the persons listed on the attached service list.


Rebecca Ward

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Served via U.S. mail

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